No. 80-1173

In the Supreme Court of the United States

OCTOBER TERM, 1980

J.F. HOFF ELECTRIC COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND LOCAL UNION 323, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly found that the Union did not violate Section 8(b)(4)(B) of the National Labor Relations Act by picketing at a common construction site gate through which supplies were delivered for the sole use of the employer with which the Union had a primary labor dispute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-39) is not yet reported. The decision and order of the National Labor Relations Board (Pet. App. 40-61) are reported at 241 N.L.R.B. No. 98.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. On December 1, 1980, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 12, 1981. The petition was filed on January 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 62-64.

STATEMENT

1. Petitioner Hoff is an electrical subcontractor employing non-union workers, who was engaged to install the complete electrical system for a residential construction project in North Palm Beach, Florida. The project itself was located at the extreme southern end of a site that was more than 1600 feet long. The only access to the project was through two entrances from a highway that ran along the western boundary of the site. The north or "reserved" gate, at the far end of the site away from the project, was designated for the use of Hoff, several other subcontractors, and their employees and suppliers. The south or "neutral" gate, situated approximately 500 feet south of the north gate and near the construction project, was designated for use by everyone else connected with the project. (Pet. App. 4, 52-53; A. 110-112, 215-218, 227-228.)[1]

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[1] "A." refers to the appendix to the briefs in the court below.

Consolidated Electric Supply Company was the supplier of the lighting fixtures which constituted one component of the electrical system Hoff had contracted to install throughout the project. Consolidated regularly delivered fixtures to the project site once or twice a week, always through the south gate. During November and December of 1977 and January of 1978, the Consolidated driver normally left the boxes of fixtures at the project owner's trailer on the site. (Pet. App. 4, 54; A. 96-99, 128-129, 161-162, 187-188.) When Hoff was ready to install the fixtures, its foreman would go to the project owner's trailer, open the boxes, check the fixtures for breakage, take the fixture components he was ready to install to the construction project, and repack the other items into boxes for storage (Pet. App. 4, 55; A. 95-97, 102, 129, 135-140). On at least one occasion, however, the Consolidated driver delivered fixtures directly to the construction project, where Hoff's employees unloaded them from the truck (Pet. App. 54-55; A. 100-101, 163-164, 191-197). Although the project owner's representative on the project site ordered and paid for the fixtures, she consulted with Hoff's foreman in scheduling deliveries so the fixtures would be there when Hoff needed them (Pet. App. 4; A. 96, 115).[2]

On November 7, 1977, the respondent Union began picketing in the vicinity of the north gate with signs protesting the fact that the wages paid Hoff's employees did not meet union standards (Pet. App. 4, 53; A. 31, 53, 74-76, 166, 185). This picketing continued without incident into December. Sometime in the middle of December, after the pickets

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[2]On February 7, 1978, a few days after the Union's picketing near the south gate was enjoined (*infra*, page 3), the project owner's trailer was moved to another location and shortly thereafter Hoff brought a trailer of its own onto the project site. From then on, although the project owner's representative continued to order the fixtures, Consolidated delivered the fixtures directly to Hoff's own trailer, where Hoff's foreman checked and initialed the invoices. (A. 93, 134-135, 142-144.)

observed one of Hoff's trucks enter the project through the south gate, the Union's business manager told them to watch for further use of the south gate by Hoff or its suppliers. (A. 156-157, 174-175, 178-179, 204-205.) About a week later, the pickets observed a Consolidated truck enter the project through the south gate. They reported this incident to the Union, and a day or two later, on December 28, the Union extended its picket line to within a few feet of the south gate, and also began to picket along the fence in front of the area where Hoff's employees were working, between the south gate and the southern boundary of the project. (Pet. App. 4, 54; A. 31-36, 43, 153-157, 170-172, 204-207.) Approximately four days later, after receiving a letter from Hoff's attorney stating that Hoff and its suppliers would use only the north gate, the Union withdrew its pickets from the south gate, but continued to picket at points 150 feet north and south of that gate, on advice of counsel (Pet. App. 4-5, 53-54; A. 36-40, 44-46, 157-158, 169-170, 201-202, 210, 224-225). At the end of January 1978, the pickets were enjoined from picketing anywhere except within 25 feet of the north gate (Pet. App. 5 n.3, 54; A. 47, 160). There is no evidence that any employee refused to enter the construction site as a result of the Union's picketing.

2. The Board, with one member dissenting, found that the Union did not violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B), by picketing near the south gate, because supplies for Hoff's use were being delivered regularly through that gate. The Board majority relied upon the Fifth Circuit's holding in *Linbeck Construction Corp.* v. *NLRB*, 550 F. 2d 311, 318 (1977), that "any gate used to deliver materials essential to the primary employer's normal operations is subject to lawful picketing," and concluded that the electrical fixtures delivered by Consolidated, which were an integral and necessary component of the electrical system which Hoff had been engaged to install in the pro-

ject, were "essential" to Hoff's normal operations at the project. Accordingly, the Board dismissed the complaint.[3] (Pet. App. 40-42, 55-61.)

3. A divided panel of the court of appeals affirmed the Board's decision. After reviewing the law of common situs picketing, which recognizes that neutral employees delivering supplies for the primary employer are a traditional object of lawful, primary picketing, the court stated (Pet. App. 10-11; emphasis in original):

> These principles are not in dispute in this case; since Consolidated concededly used the neutral south primary gate regularly, our analysis would end here were it not for the argument advanced by Hoff that Consolidated was not one if *its* suppliers, but rather a supplier to the project owner who ordered and paid for the fixtures, and thus was in fact simply another subcontractor on the project, making deliveries to the owner, and properly using the neutral gate. The issue of who must use the reserved gate in order to avoid the legitimate picketing of an assertedly "neutral" gate is the focus of the dispute in this case.

Agreeing with the Fifth Circuit's reasoning in *Linbeck Construction Corp.* v. *NLRB, supra,* the court held that the Board's approach to determining who is a "supplier" of the primary employer correctly rested upon a determination whether the supplies were intended for the use of the primary employer, and not upon whether the primary employer was the legal owner of the supplies. It explained (Pet. App. 15):

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[3]The Board also found, without dissent, that the Union's picketing in the area south of the south gate, where Hoff's employees were working on the construction in progress, was lawful. The court of appeals affirmed this finding (Pet. App. 20-22), and petitioner has not challenged it in this Court.

> [W]e agree with the Board's rejection of any formalistic notion of legal ownership of materials delivered in favor of a more realistic analysis focusing on the intended use of the supplies. Thus if in fact and practice, Consolidated was delivering supplies which in the normal course of its business Hoff used and installed, Consolidated was a "supplier" of Hoff, no matter where legal title to the supplies might lie, and by using the south gate Consolidated contaminated its neutrality, permitting its picketing by the Union.

The court concluded that Consolidated was Hoff's supplier under this test: "[I]t is hard to think of a supply more essential to electrical installation work than light fixtures" (Pet. App. 19).

ARGUMENT

The decision of the court of appeals is correct, and involves only the application of settled principles to the facts of this case. There is no conflict among the circuits on the narrow issue presented here, and further review is therefore unwarranted.

1. Section 8(b)(4)(B) of the Act was designed to preserve "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes" and, at the same time, to shield "unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). Application of Section 8(b)(4)(B) thus requires that the union conduct at issue be classified either as legitimate "primary" activity directed against the offending employer with whom the union has a labor dispute, or as unlawful "secondary" activity directed against a neutral employer with whom the union does not have a dispute.

Where, as here, the primary and neutral employers perform separate work on the same premises (a common situs),

the distinction between primary and secondary activity is often difficult to draw. In *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N.L.R.B. 547 (1950), the Board enunciated certain criteria as guides for determining whether common situs picketing is primary or secondary. It explained (92 N.L.R.B. at 549; emphasis in original & footnotes omitted) that picketing is presumptively primary if:

> (a) The picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises, (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*, (c) the picketing is limited to places reasonably close to the location of the *situs*, and (d) the picketing discloses clearly that the dispute is with the primary employer.

In applying the third *Moore Dry Dock* criterion, the Board has held that picketing on a construction site, at gates reserved exclusively for neutral employers, is not "reasonably close" to the situs of the dispute with the primary employer and thus violates Section 8(b)(4)(B) of the Act. *Building & Construction Trades Council of New Orleans, AFL-CIO (Markwell & Hartz, Inc.)*, 155 N.L.R.B. 319, 323-327 (1965), enforced, 387 F. 2d 79, 83 (5th Cir. 1967), cert. denied, 391 U.S. 914 (1968). However, the Board has further held that, if, after separate gates are established, the primary employer or his suppliers or deliverymen continue to use the gate supposedly reserved for neutrals, that gate may lawfully be picketed. *Markwell & Hartz, Inc., supra*, 155 N.L.R.B. at 326 n.22; *West Kentucky Building & Construction Trades Council (Daniel Construction Co.)*, 129 N.L.R.B. 272, 276 n.15, 277 (1971); *Local 519, Plumbers & Pipefitters Union (Center Plumbing & Heating Corp.)*, 145 N.L.R.B. 215, 223 (1963). This is because, as this Court has repeatedly held, legitimate primary activity "is aimed at applying economic pressure by halting the day-to-day

operations of the struck employer." Such pressure is not limited to appealing to the primary employer's own employees, but "has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt." *Steelworkers* v. *NLRB*, 376 U.S. 492, 499 (1964); *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 388 (1969). See *NLRB* v. *International Rice Milling Co.*, 341 U.S. 665 (1951).

2. Petitioner does not disagree with any of the principles stated above; to the contrary, petitioner conceded in the court of appeals (Br. 15) that "the integrity of a proper reserved gate system requires that not only the employees of the primary employer, but also the employees of the primary's suppliers utilize only the reserved primary gate and refrain from using the gate reserved for neutral employers and their suppliers and subcontractors." Accordingly, there is no dispute that, if Consolidated were a supplier of Hoff, the Union could legitimately picket at the south gate where the Consolidated delivery truck entered the construction site. The only issue in this case, therefore, is whether the Board and the court of appeals erred in finding that Consolidated was a supplier of Hoff. Such a narrow question, which turns on an evaluation of the facts of this particular case, does not warrant review by this Court. Moreover, the finding of the Board and the court of appeals is clearly reasonable.

As shown (*supra*, pages 2-3), the Consolidated truck's only business at the construction site was to deliver materials to be used solely by Hoff in its normal operations at the site. Consolidated's deliveries were scheduled according to Hoff's needs, and no one other than Hoff's employees handled the fixtures after delivery. During the period prior to February 7, when Hoff had no trailer on the project site in which the fixtures could conveniently be stored, Consoli-

dated delivered the fixtures to the project owner's trailer. However, the project owner did nothing with the fixtures other than accept delivery; Hoff's foreman opened the boxes of fixtures and transported them to the jobsite where Hoff's employees installed them. After Hoff brought its own trailer onto the jobsite, Hoff's foreman also began accepting deliveries and initialing the invoices. No other subcontractor at the construction site did any work involving the fixtures delivered by Consolidated. Even the dissenting judge below acknowledged (Pet. App. 24) that in these circumstances Consolidated "seems to be a supplier of Hoff."

3. Petitioner, like the dissenting judge in the court below (Pet. App. 23-28), contends (Pet. 14-18) that, because Consolidated was independent of Hoff and sold electrical fixtures directly to the project owner who retained title to them, Consolidated may not properly be treated as a supplier of Hoff for purposes of Section 8(b)(4)(B). To treat it as Hoff's supplier in these circumstances, they contend, would be to disregard the holding in *NLRB* v. *Denver Building & Construction Trades Council, supra,* 341 U.S. at 689-690, that separate employers in the construction industry do not lose their independent contractor status merely because they work together on the same construction project. This contention misconceives the scope of the Board's decision in this case. The Board did not hold that the Union could lawfully picket either the project owner or the other contractors on the construction site. Rather, the Board held only that the Union could picket Hoff at the gate through which its supplies were being delivered. Nor does this decision subject a general contractor to picketing merely because he supplies materials or machinery to the primary employer (Pet. 15-16). As the court below emphasized (Pet. App. 18; emphasis in original):

> We find it significant that this supplier delivered products used *only* by Hoff, not other subcontractors; therefore, any disruption caused if the Union should be successful in its appeal to Consolidated's deliveries would not spread to anyone but the primary employer. The ease with which any impact on the other, neutral subcontractors on the site could be completely avoided simply by requiring Consolidated to deliver its products through the reserved gate; illustrates the limited intended impact of the Union's action. We need not engage in any sophisticated discussions of more attenuated connections in other cases.

4. The decision of the court of appeals does not, as petitioner contends (Pet. 21-22), conflict with the decisions of the Sixth and the Ninth Circuits in *NLRB* v. *Nashville Building & Construction Trades Council*, 383 F. 2d 562 (6th Cir. 1967), and *Carpenters Local 470* v. *NLRB*, 564 F. 2d 1360, 1362 (9th Cir. 1977). Those cases hold only that the "work relatedness" test applied to primary activity at an industrial plant in *Local 761, Electrical Workers* v. *NLRB* (*General Electric Co.*), 366 U.S. 667 (1961),[4] is not applicable to the relationship among the various contractors on a

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[4]In *General Electric*, the union representing the production and maintenance employees at the company's plant called a strike over contract terms and established picket lines at the various gates of the plant. The company, in addition to receiving deliveries and supplies from neutral employers, also had at work on its premises a number of independent contractors who, with their employees, were performing a variety of tasks ranging from construction of new buildings to general maintenance work. The company, in an effort to minimize the impact of the picketing on these independent contractors, set aside a separate gate exclusively for their use. This Court held that the legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the employer's plant, the picketing was unlawful secondary activity.

construction project. The court below accepted that limitation on the *General Electric* holding dictated by the thrust of *Denver Building Trades*; thus it recognized (Pet. App. 13 n.7) that, under *Denver Building Trades*, "a dispute with the general contractor does not justify picketing of an entire construction project, whether on the theory that all subcontractors are 'employees' of the general contractor or on the theory that they are all doing 'related work.' " But, as the court below properly concluded, *Denver Building Trades* does not answer the problem here, "which is identifying the 'customers and suppliers' [of the primary employer] who *are* legitimate objects of the union's appeal" (*ibid.*; emphasis in original); see also Pet. App. 12, 16).

The court's resolution of that problem is in accord with the decision of the Fifth Circuit in *Linbeck Construction Corp.* v. *NLRB*, 550 F. 2d 311 (1977), which involved a similar situation. The court there held that a supplier who, like Consolidated here, delivered materials that were solely for, and essential to, the primary employer's normal operations on a construction site could lawfully be picketed at a "neutral" gate on that site. Rejecting the contention that the picketing was secondary because the primary employer did not have title to the materials, the court stated (550 F. 2d at 318):

> If we were to adopt [that] reasoning, general contractors throughout the construction industry could stop a "traditional goal of primary pressure"—halting the operations of the primary employer through the influence of a picket line on those suppliers who contribute thereto—by the simple expedient of retaining legal title to all materials to be used by the sub-contractors.

The court here properly declined to rely on such technical distinctions in resolving the narrow question whether Consolidated was a supplier of Hoff for the purposes of Section 8(b)(4)(B).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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